Supreme Court, U.S.
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No. 92-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA SMITH (WIDOW OF LINDEL SMITH) (DECEASED), JERRY LYNN SMITH, LARRY WAYNE SMITH, TINA MARIE SMITH, JIMMIE DARRELL SMITH, AND BELINDA JOY MATEJA,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE THE APPELLATE LAWYERS ASSOCIATION OF ILLINOIS IN SUPPORT OF PETITIONERS

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32 pp

QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit erred in dismissing a black lung claimant's appeal for lack of jurisdiction based on Rules 3(c) and 43(a) of the Federal Rules of Appellate Procedure when the court's construction of those rules conflicts with Supreme Court precedent, creates a conflict among the circuits, offers an unwieldy and unintelligible reading of the rules, and places an unfair and undue burden on the appellate bar and its clients while undermining the credibility of the judicial system.

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BRIEF OF AMICUS CURIAE THE APPELLATE LAWYERS ASSOCIATION OF ILLINOIS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Appellate Lawyers Association of Illinois is a statewide association of 400 lawyers who practice primarily in state and federal courts of appeal. The Association takes public stands on issues such as the merit selection of judges and files amicus briefs in appeals involving issues

of appellate procedure and practice. Through its Pro Bono Committee, the Association coordinates the volunteer efforts of its members in preparing briefs and prosecuting appeals on behalf of indigent criminal defendants and for the Cook County Public Guardian's Office.

The Association publishes an appellate law review twice a year and a summary of cases pending in the Illinois Supreme Court five times a year. In addition, it sponsors advanced seminars devoted to issues of appellate practice and has maintained the Illinois Institute for Continuing Legal Education handbook on Illinois civil appeals.

As a professional association for the appellate bar, the Association takes a great interest in promoting the accurate application of Supreme Court precedent. The Association also takes a great interest in promoting straightforward and fair interpretations of the Appellate Rules of Procedure. Finally, the Association takes a great interest in ensuring the fair and efficient administration of justice and resolution of its clients' appeals on the merits.

The Association has an interest in this appeal because it believes that the Sixth Circuit's holding contravenes Supreme Court precedent and a decision of the United States Court of Appeals for the Tenth Circuit. The Association further believes that the Sixth Circuit's holding directly contradicts and ignores the plain language of Rule 43(a) and the language of Rule 1(b). Above all, the Association believes that the Sixth Circuit's holding will unfairly burden the appellate bar and the clients it serves while, at the same time, undermining the credibility of the federal judiciary. For these reasons, the Association takes a special interest in this case and respectfully submits this *amicus curiae* brief.

ARGUMENT

Procedurally, this case is straightforward. A claimant seeking black lung benefits from the Office of Workers' Compensation Programs died before a notice of appeal could be filed. As authorized by the claimant's surviving adult children, appellate counsel filed a notice of appeal and then filed a motion to substitute, with the intention of substituting the claimant's children as parties to the appeal. The Sixth Circuit dismissed the timely filed appeal on the basis of lack of jurisdiction. The court held that (1) the notice of appeal was defective because "there [was] no indication within the notice of appeal that the adult children [were] the appealing parties," Appendix A p. 2; *see* Fed. R. App. P. 3(c), 43(a), and (2) the time period had expired for filing a motion to substitute the adult children as parties, Appendix A p. 2.

In reaching its holding, the court has ignored Supreme Court precedent and created a conflict among the circuits. In its construction of Rule 43(a), the court has provided an unwieldy and unintelligible interpretation of the Federal Rules of Appellate Procedure, burdened the appellate bar and its black lung clients, and jeopardized the administration of justice and the credibility of the federal courts. The Sixth Circuit's order cannot be allowed to stand. A writ of certiorari should be granted, and the Sixth Circuit's order should be reversed.

I.

THE SIXTH CIRCUIT'S IMPLICIT CONSTRUCTION OF RULE 3(c) DIRECTLY CONTRAVENES THIS COURT'S INTERPRETATION OF THE RULE

Both a primary holding and the basis of the Sixth Circuit's order in this case is the court's conclusion that it

lacked jurisdiction because there was no indication in the notice of appeal that the five adult children of the claimant "who authorized the notice of appeal," Appendix A p. 2, were the appealing parties. *Id.* There was, in other words, no jurisdiction because the notice of appeal did not, as required by Rule 3(c) of the Federal Rules of Appellate Procedure, "specify the party or parties taking the appeal." Fed. R. App. P. 3(c). Based on this Court's decisions in *Torres v. Oakland Scavenger Co.*, 482 U.S. 312 (1988), and *Smith v. Barry*, 112 S. Ct. 678 (1992), the court could not have been more mistaken.

In *Torres* and *Smith*, this Court considered the requirements for identifying parties in a notice of appeal for purposes of Rule 3(c). In both cases, the Court held that a timely filed notice of appeal serves its purpose if it gives fair notice of the nature and extent of the appeal to the court and the opposing party. *Torres*, 482 U.S. at 318; *Barry*, 112 S. Ct. at 682. Although this Court in *Torres* did hold that Rule 3 is jurisdictional, at the same time it also cautioned that "the requirements of the rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 482 U.S. at 316 (citing *Foman v. Davis*, 371 U.S. 178, 181 (1962)).

What the court overlooked in dismissing the timely filed notice of appeal in this case because it did not name the claimant's surviving adult children as parties is that the respondent expressly acknowledged that the notice of appeal provided *actual notice* of the nature and extent of the appeal, Appendix B pp. 5-6—neither of which can be altered or affected by substitution of a claimant's survivors. Not only did the notice of appeal itself provide the notice required by *Torres* and *Barry*, but the Director of the Office of Workers' Compensation Programs in-

dicated that his agency *always* has either actual or constructive notice of the nature and extent of any appeal from the Benefits Review Board. As stated by the Director:

> In our view, dismissal of this case for lack of jurisdiction would be a particularly harsh result. All of the parties to a black lung claim are aware, if not actually then constructively, of the order by which individuals may succeed to the right to black lung benefits in the case of death. 20 C.F.R. § 725.545. Each case appealed to a federal circuit court involves only a single order of the Benefits Review Board, affirming or reversing a decision on a claim for benefits. The problems addressed by the Supreme Court in *Torres* are thus not present in black lung benefits litigation.

Appendix B pp. 5-6.

That jurisdiction is not an issue when there is "no surprise, detrimental reliance, or prejudice to appellees because one or more parties ha[s] not been listed by name in the notice of appeal"[1] was decisively affirmed after this Court's decision in *Torres* by the First Circuit in *In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989).

The notice of appeal in *In re Grand Jury Proceedings* stated that the "United States of America" was appealing when, in fact, an Assistant United States Attorney was appealing a conviction for contempt of court. Even though the United States did not have standing to appeal, the court nonetheless found that the notice of appeal was sufficient and that the court had jurisdiction:

> This is not a multi-party case where the notice of appeal fails to make clear which party or parties

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[1] *Ayers v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1177 (5th Cir. 1986).

> intend to appeal, thereby providing notice so vague as to deprive the court of jurisdiction over the unnamed parties' appeals. *Cf. Torres*, 108 S. Ct. at 2409. The problem with [the appellant's] notice of appeal is an "informality of form or title" which should not lead to dismissal. . . .

Id. at 931.

In this case, the Sixth Circuit knew that (1) the notice of appeal gave the respondent actual notice of the nature and extent of the appeal and (2) it was irrelevant to the nature and extent of the appeal whether the claimant or her survivors were the appealing parties. The court's decision to ignore these facts has elevated form over substance and allowed " 'mere technicalities' . . . [to] stand in the way of consideration of [the] case on its merits." *Torres*, 482 U.S. at 316. That decision cries out for review.

II.

THE SIXTH CIRCUIT'S CONSTRUCTION OF RULE 43(a) CREATES A CONFLICT AMONG THE CIRCUITS BY CONFLICTING WITH A DECISION OF THE TENTH CIRCUIT

The court's decision must also be reviewed because the court has misinterpreted and misapplied Rule 43(a) in reaching its holding that the time had expired for substituting the claimant's adult children as parties. In reaching that holding, the court has created a conflict between its decision in this case and the Tenth Circuit's decision in *Slade v. United States Postal Service*, 952 F.2d 357 (10th Cir. 1991).

In *Slade*, the Tenth Circuit allowed a motion to substitute where the party had died before a notice of appeal was filed, even though the motion to substitute was filed almost four months after the filing of a timely notice of

appeal. *Id.* at 359-60. Basing its decision on the plain meaning of Rule 43(a), the court found both the notice of appeal and the motion to substitute to be proper. The court stated:

> Rule 43(a) . . . provides that "[a]fter the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision." Any party may suggest a death on the record if the deceased party has no representative, and proceedings shall then be had as the court of appeals may direct. Rule 43(a). Therefore, Rule 43(a) contemplates the filing of a notice of appeal and substitution of a party after the death of the party.

Id. at 360.

In contrast to the Tenth Circuit in *Slade*, the Sixth Circuit in this case has directly held that a motion to substitute must be filed within the time limit for filing the notice of appeal. Appendix A p. 2. That the court cites no language from Rule 43(a) in support of this holding is not only significant but dispositive: there is no such language.

Because the Sixth Circuit's holding creates a conflict among the circuits, this Court should grant the writ of certiorari and resolve that conflict in favor of the petitioners.

III.

THE SIXTH CIRCUIT'S CONSTRUCTION OF RULE 43(a) CONSTITUTES AN UNWORKABLE AND UNINTELLIGIBLE INTERPRETATION OF RULE 43(a) AND THE FEDERAL RULES OF APPELLATE PROCEDURE

The Sixth Circuit's appeal to Rule 43(a) in support of its two-pronged jurisdictional holding not only creates a conflict among the circuits, but its construction of Rule

43(a) and the Federal Rules of Appellate Procedure is unworkable and unintelligible, ignoring the language and intent of both.

A. The Sixth Circuit's Holding Establishing an Outer Time Limit for Filing a Motion To Substitute Directly Contradicts the Plain Language of Rule 43(a)

Contrary to the court's intimation in its order, Appendix A p. 2, the plain language of Rule 43(a) does not specify any time limit for filing a motion to substitute. The relevant portion of Rule 43(a) provides:

> If a party entitled to appeal shall die before filing a notice of appeal, *the notice of appeal* may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record *within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected* in the court of appeals *in accordance with this subdivision.*

Fed. R. App. P. 43(a) (emphasis added). The drafters of Rule 43(a) included a reference only to the time limit for filing the notice of appeal—i.e., "within the time prescribed by these rules." *Id.* By contrast, there is no reference to a comparable time limit for filing a motion to substitute, and the rule states only that such a motion is to be filed "after the notice of appeal in the court of appeals." *Id.* The rule also states that a motion to substitute should be "effected . . . in accordance with this subdivision." *Id.* None of the language of the subdivision suggests an outer time limit for effecting a proper substitution.

The Sixth Circuit dismissed the timely filed appeal in this case, in part, because the appellate counsel moved to substitute the claimant's survivors as parties to the appeal only after the expiration of the time limit for filing

the notice of appeal. Even construed conservatively, the plain language of Rule 43(a) does not require appellate counsel to move to substitute within sixty days of judgment.

Particularly in black lung cases, where the agency always has either actual or constructive knowledge of the nature and extent of the appeal, *see supra* p. 5, the Sixth Circuit's creation of an outer time limit constitutes an unintended and unnecessary addition to the language of Rule 43(a). Unquestionably, had the drafters of the Federal Rules of Appellate Procedure believed a time limit for a motion to substitute warranted, they would have provided for one. They drafted no such provision.

Because the Sixth Circuit's construction of Rule 43(a) violates the language and intent of Rule 43(a), the Association respectfully urges this Court to grant the writ of certiorari and reverse the Sixth Circuit's erroneous construction.

B. The Sixth Circuit's Holding Denies a Right of Appeal to Claimants Who Die Before Filing a Notice of Appeal and Thereby Ignores Rule 43(a)'s Mandatory Directive

In addition to contradicting the plain language of Rule 43(a), the Sixth Circuit's holding disregards the structure of the rules by ignoring Rule 43(a)'s mandatory directive. Rule 43(a) of the Federal Rules of Appellate Procedure establishes the method for substitution on the death of a party, specifically providing for substitution in a case where a claimant dies before the filing of the notice of appeal. Fed. R. App. P. 43(a). What the Sixth Circuit's holding effectively does, however, is to deny a right of appeal to claimants who die before filing a notice of appeal.

In its order dismissing the timely filed appeal in this case, the court specifically found and held:

> Even if [the filing of the notice of appeal] meets the Rule 43 requirements, there is no indication within the notice of appeal that the adult children are the appealing parties. This court has held that the identification of the appealing parties in the notice of appeal is a jurisdictional requirement. . . . Therefore, this court lacks jurisdiction over the movants.

Appendix A p. 2 (citation omitted). In effect, the Sixth Circuit's holding requires a deceased claimant's counsel to substitute new parties *before* actually filing the notice of appeal, so that these new parties can be named as parties in the notice of appeal.

The court's new requirement is one that is incapable of being met under Rule 43(a) and the Federal Rules of Appellate Procedure. Rule 43(a) provides that if a claimant dies before a notice of appeal is filed "substitution *shall* be effected in the court of appeals." Fed. R. App. P. 43(a) (emphasis added). A court of appeals cannot, however, approve or disapprove a motion to substitute until it obtains jurisdiction, and it is the notice of appeal that vests a court of appeals with jurisdiction. A court of appeals cannot, therefore, approve a motion to substitute until a notice of appeal is filed.

If the Sixth Circuit's order is allowed to stand, a notice of appeal cannot be filed unless the court of appeals has granted a motion to substitute. Rule 43(a) and the court's new requirement conflict, creating a no-win (and no-appeal) situation for the survivors of deceased claimants.[2]

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[2] This is so particularly where a survivor's deceased was a black lung claimant. This is true because the black lung regulations do

(Footnote continued on following page)

The drafters of Rule 43(a) would not have drafted a rule establishing the method for substitution on the death of a party if they had actually intended to close off the appeal process to appellants who die before filing a notice of appeal. The Sixth Circuit's holding ignores the very existence of Rule 43(a), creating a harsh and unjust result that could not have been intended by the drafters of the rule. That holding compels review by this Court.

C. The Sixth Circuit's Characterization of Rule 43(a) as Jurisdictional in Nature Directly Contradicts the Plain Language of Rule 43(a) and Rule 1(b)

When an appellant dies before a notice of appeal is filed, Rule 43(a) provides that, if there is no personal representative, the notice of appeal "*may* be filed . . . by that party's attorney of record." Fed. R. App. P. 43(a) (emphasis added).

The notice of appeal in this case was filed by the appellate attorney retained on essentially a *pro bono* basis by the deceased claimant's adult children.[3] In its order, the court found further support for a jurisdictional holding based on Rule 43(a) because "[t]here [was] also no indication in the notice of appeal that the decedent's attorney

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[2] *continued*
not squarely address substitution but provide instead that claims continue upon the death of a claimant absent an affirmative showing that the successors to the claim do *not* wish to pursue it. 20 C.F.R. § 802.402 (1992).

[3] Although attorney's fee awards are available to counsel for prevailing claimants pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901-962 (1988), and rules promulgated under the Act, 20 C.F.R. §§ 725.360-725.367 (1992), the length of time, uncertainties, and frequent reductions and limitations of such awards makes representation of black lung claimants essentially a *pro bono* endeavor for the private bar.

[was] the appealing party." Appendix A p. 2.[4] There are four overriding reasons why this construction of Rule 43(a) and the court's jurisdictional conclusion must be reviewed and rejected.

The first reason why the court's construction and conclusion must be rejected is because Rule 43(a)'s directive that a notice of appeal "*may*" be filed by a personal representative or "that party's attorney of record" is—unlike the "shall" language controlling substitution—permissive, not mandatory. Presumably, only a personal representative or an attorney of record would be in a position to want to file a notice of appeal. By Rule 43(a)'s terms, however, the party allowed to file a notice of appeal is not so limited.

The second reason why the court's construction and conclusion must be rejected is because the referents of "attorney of record" and "that party[ ]" in Rule 43(a)'s "that party's attorney of record" are at best ambiguous. "[A]ttorney of record" does not necessarily mean "*trial* attorney of record." Fed. R. App. P. 43(a). When the appellate attorney filed the notice of appeal in this case, she was "of record," if not for the deceased directly, then for "*that party's*" successors in interest. No personal representatives had been appointed, and no substitution had been (or could have been) made.

The third reason why the court's construction and conclusion must be rejected is because based, as they are,

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[4] The irrationality of the Sixth Circuit's primary holding is readily apparent in light of this additional jurisdictional holding. Had the "appealing party" in the notice of appeal been the decedent's trial attorney, the adult children would not have been mentioned in the notice of appeal, and under the court's Rule 3(c) reasoning, there would have been no jurisdiction because they were not named as parties.

on technicalities, both severely limit the jurisdiction of the court of appeals. In interpreting Rule 43(a)'s permissive and ambiguous directive as a jurisdictional barrier, the Sixth Circuit has violated Rule 1(b) of the Federal Rules Appellate Rules of Procedure which explicitly commands:

> These rules shall not be construed to extend or limit the jurisdiction of the courts of appeal as established by law.

Fed. R. App. P. 1(b).

The fourth reason why the court's construction and conclusion must be rejected is because it leads to absurd results. The absurdity of the results is illustrated by this case where, if the decision below is allowed to stand, the merits of the appeal will not be heard despite twelve years of administrative proceedings and agreement between both parties that the administrative decision should, at a minimum, be vacated and remanded.

There is no justification, excuse, or reason for the Sixth Circuit's jurisdictional construction of Rule 43(a). That construction must be reviewed and rejected.

IV.

THE SIXTH CIRCUIT'S CONSTRUCTION OF RULE 43(a) BURDENS THE SURVIVORS OF DECEASED BLACK LUNG CLAIMANTS AND THEIR APPELLATE COUNSEL WHILE UNDERMINING THE CREDIBILITY OF THE COURTS

By elevating form over substance and allowing mere technicalities to stand in the way of consideration on the merits, the Sixth Circuit has both burdened the rights of the litigants and further jeopardized the future of the federal judiciary. Neither of the court's actions can be countenanced or permitted to stand.

A. The Court's Holding Unduly Burdens Survivors and Their Appellate Counsel

The court below has held that, in cases where a black lung claimant dies before a notice of appeal is filed from an adverse judgment, a reviewing court is without jurisdiction to hear the appeal unless the notice of appeal names the claimant's survivors or is brought by the decedent's trial attorney. This holding particularly burdens the survivors of black lung and similar claimants as well as their attorneys.

The court's holding burdens such claimants because black lung and similar cases typically involve a significant lapse of time between the filing of an agency appeal with the Benefits Review Board and the resolution of that appeal. In this case, for example, the lapse of time between filing and decision was over five years. During that waiting period, the trial attorney (who is often volunteering his or her services or working for legal aid) might die, move, or leave the practice of law. There would not be a substitution of counsel while a decision is pending.

Under the court's holding in this case, if the original counsel is not available to pursue the appeal and no "personal representative" is appointed within sixty days, no notice of appeal can ever be filed. In many cases, especially those (like this one) involving coal miners or other individuals lacking substantial funds, when a party dies, no formal estate is opened, and there is no personal representative. The survivors—frequently, like the survivors in this case, without funds to retain legal services on their own—are deprived of any right to appeal.

The court's holding burdens the survivors' appellate attorneys because those attorneys, like the original trial attorneys, more likely than not are providing their services *pro bono*. This means that generally they are called to

provide their services at the last minute with directions to file a notice of appeal on time and in the right court. By the time they are retained, there is no time before the notice of appeal is due to open an estate and have a personal representative appointed.

As a practical matter, the court's elevation of Rule 43(a)'s permissive directives to jurisdictional mandates leaves newly-appointed and *pro bono* appellate counsel with no choices and no options except to refuse to be appointed or to volunteer. That result cannot be countenanced.

B. The Court's Holding Jeopardizes the Administration of Justice and Credibility of the Federal Judiciary

The court's holding in this case goes beyond the immediate parties and attorneys involved. The court's holding is in fact at the center of what is perceived by both the bar and the public as an effort by the federal courts to deny justice in meritorious cases on purely technical grounds that have nothing to do with real issues of jurisdiction. That perception was recently articulated by University of Texas Law School Professor Michael Tigar at the meetings of the American Bar Association.

As reported in the *Chicago Daily Law Bulletin* on August 26, 1992, Professor Tigar warned that

> using technical rules to dismiss otherwise sound cases is harming the administration of justice, and "more important . . . the appearance of justice."
>
> What is happening is that circuit panels are issuing "more and more technical opinions," and appeals are disappearing out of the system on technical grounds, Tigar said.

Mary Holden, *Form Ruining Appellate Substance, Prof Says*, Chicago Daily Law Bulletin, August 26, 1992, at 1.

Unless the order of the Sixth Circuit in this case is reviewed and reversed, this appeal, too, will join the disappeared, sacrificed on technical grounds so that the merits of a great number of appeals taken on behalf of the poor survivors of black lung claimants need never be reached. Without review and reversal, the harm done to this Court and to the courts under this Court's supervision and control is incalculable.

CONCLUSION

Because the order in this case creates jurisdictional barriers that are neither found in nor supported by the decisions of this Court or the Federal Rules of Appellate Procedure, burdens those least able to afford justice, and undermines both the administration and appearance of justice, the Appellate Lawyers Association urges this Court to grant the petition for certiorari and to reverse the holding of the Sixth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 91-3978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA SMITH (widow of Lindel Smith, deceased),	)	
Petitioner,	)	February 10, 1992
v.	)	ORDER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondent.	)	

BEFORE: KENNEDY and JONES, Circuit Judges; BROWN, Senior Circuit Judge.

A notice of appeal has been filed in the name of Virginia Smith, the claimant for survivor's benefits in this petition for review of a decision of the Benefits Review Board (Board) denying black lung benefits. Five adult children of the claimant now move to be substituted as petitioners based on the death of the petitioner. The Director has filed a response. Although the Director does not object to substitution, a jurisdictional issue is raised which this court must examine.

The claimant died while her appeal was pending before the Benefits Review Board. Subsequently, the Board issued its decision affirming the denial of benefits. The notice of appeal purports to be on behalf of Virginia Smith. Fed. R. App. P. 43(a) provides in part that if a

party dies before filing a notice of appeal, the notice may be filed by either the decedent's personal representative, or, if there is no such representative, by the decedent's attorney.

In the instant case, it was apparently the decedent's adult children, as her personal representatives, who authorized the notice of appeal. Even if this meets the Rule 43 requirements, there is no indication within the notice of appeal that the adult children are the appealing parties. This court has held that the identification of the appealing parties in the notice of appeal is a jurisdictional requirement. *Minority Employees v. Tennessee*, 901 F.2d 1327 (6th Cir.) (en banc), *cert. denied*, 111 S.Ct. 210 (1990). Therefore, this court lacks jurisdiction over the movants. This cannot now be corrected by a motion under Fed. R. App. P. 43 to substitute since the motion to substitute was made after the expiration of the appeal period. To grant the motion in this case would essentially extend the period for appeal, an act this court lacks authority to take. *See Minority Employees*, 901 F.2d at 1337.

There is also no indication in the notice of appeal that the decedent's attorney is the appealing party. For the reasons stated above, failure to provide such notice divests this court of jurisdiction. *See id.*

It is ORDERED that the motion for substitution is denied. It is further ORDERED that this appeal is dismissed *sua sponte* for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA SMITH, WIDOW OF LINDEL SMITH,	)	
Petitioner,	)	
v.	)	No. 91-3978
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondent.	)	

DIRECTOR'S RESPONSE TO MOTION FOR SUBSTITUTION OF PARTIES DUE TO DEATH OF PETITIONER

Pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure, the Director, Office of Workers' Compensation Programs, United States Department of Labor, by counsel, submits the following response to the Petitioner's Motion for Substitution of Parties due to Death of Petitioner.

On January 14, 1986, an administrative law judge with the Department of Labor denied Petitioner Virginia Smith's claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 (1981). Smith sought review by the Benefits Review Board, the agency's appeal board. Smith died on May 14, 1988, before the Board issued its decision adverse to her on August 22, 1991. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporating section 21(c) of the Longshore and Harbor Workers' Com-

pensation Act, 33 U.S.C. § 921(c), requires that a petition for review of an order of the Board be filed in the court of appeals within 60 days after the issuance of the Board's order. That sixty-day appeal period is jurisdictional; failure to timely file requires dismissal. *Danko v. Director, OWCP*, 846 F.2d 366 (6th Cir. 1988). A Notice of Appeal was filed with this Court in the name of "VIRGINIA SMITH (widow of LINDEL SMITH) (deceased)" on October 21, 1991.

By motion dated December 3, 1991, the five adult children of Smith moved to be substituted as her personal representatives pursuant to Rule 43 of the Federal Rules of Appellate Procedure. The basis for their motion is the death of Virginia Smith on May 14, 1988. This motion is the first notice of the Director has received of Smith's death.

The Director is compelled to point out that the Court may lack jurisdiction over this case because the real party in interest has not filed either a timely petition for review or a timely motion to amend. Rule 15 of the Federal Rules of Appellate Procedure requires that a petition for review of an agency order be filed "within the time limits prescribed by law" and that the petition "shall specify the parties seeking review." The requirements of Rule 15 for obtaining review of an administrative decision track those of Federal Rules for Appellate Procedure 3 and 4 for obtaining review of a district court decision.

The Supreme Court of the United States has held that the failure to name a party in a notice of appeal "constitutes a failure of that party to appeal." *Torres v. Oakland Scavanger Co.*, 108 S.Ct. 2405, 2407 (1988). The Court characterized Appellate Rules 3 and 4 as establishing a "singular jurisdictional threshold" and construed the specificity requirement of Rule 3(c) as a jurisdictional prerequisite designed "to provide notice both to the op-

position and to the court of the identity of the appellant or appellants." *Id.*, at 2409. The Court noted the specificity requirement should be liberally construed when determining compliance—accepting papers which are the functional equivalent of a notice of appeal, "however inartful," as long as they are timely filed or amended pursuant to Rule 4. *Id.* However, "[t]he failure to name a party in a notice of appeal is more than excusable 'informality;' it constitutes a failure of that party to appeal." *Id.*, at 2407. If an individual or entity is not named or otherwise designated within the time limits for filing an appeal, then the court of appeals is deprived of jurisdiction over the unnamed parties.[1] *Id.*, at 2407-09. The Third Circuit has determined the jurisdictional principles discussed in *Torres* were applicable to black lung cases under Federal Rule of Appellate Procedure 15. *Kowaleski v. Director*, OWCP, 879 F.2d 1173, 1175-77 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990).

Subsequent to *Torres*, this Court noted "the safest way of securing an appeal is for the party or parties seeking appeal to state in the *body* of the notice of appeal the name of each and every party taking the appeal." *Minority Employees v. Tennessee Department of Employment Security*, 901 F.2d 1327, 1335 (6th Cir. 1990) (en banc). The Court noted, "As long as the name appears on the face of the document, the designation may fall within the language of Rule 3(c) that '[a]n appeal shall not be dis-

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[1] In *Torres*, the Court held the use of the phrase "*et al.*" was too vague to provide adequate notice to the opposing party or to the court that Torres was included in the appeal. Even though the omission of Torres was merely a clerical error, the Court rejected application of the good cause exception under Rule 2 or a "harmless error" analysis, stating the jurisdictional requirements of Rules 3 and 4 may be construed liberally, but they cannot be waived. 108 S.Ct. at 2409.

missed for informality of form or title of the notice of appeal.' " *Id.* Moreover, the circuit courts seem predisposed to allowing a defective notice of appeal to be cured by filing additional documents as long as they are filed within the time limit for filing a notice of appeal. *See Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769, 772 (10th Cir. 1991); *Masquerade Novelty, Inc. v Unique Industries, Inc.*, 912 F.2d 663, 664-65 (3d Cir. 1990); *Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990). To allow amendment outside the appeal period would effectively extend the period of time for filing a notice of appeal or petition for review which is explicitly prohibited by Federal Rule of Appellate Procedure 26(b). *Minority Employees*, 901 F.2d at 1337; *Kowaleski*, 879 F.2d at 1177.

Since Smith was no longer alive at the time of the Board's decision,[2] an appeal should not have been taken in her name personally. Where a party dies prior to filing an appeal, Rule 43(a) of the Federal Rules of Appellate Procedure states, in part

> If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

Fed.R.App.P. 43(a). In general, this rule would only seem to apply when the party in question dies after issuance of the underlying decision but prior to the expiration of the appeal time. Only after a decision has been issued can

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[2] The Board's regulations, 20 C.F.R. Parts 801 and 802, do not require, and make no provision for, the substitution of parties in the event of death.

be a party considered to be "entitled to appeal." In this case, where Virginia Smith's children were the only individuals "entitled to appeal," the appeal should have been taken in their names. Even if Rule 43(a) were applicable, moreover, the appeal in this should have been taken in the names of Smith's personal representative or attorney of record.[3] The petition for review gives no indication that Virginia Smith is deceased, and consequently, not personally pursuing this appeal.[4] The motion for substitution is the first notice received by the Director of Smith's demise and it was not received within the 60-day appeal period.

In our view, dismissal of this case for lack of jurisdiction would be a particularly harsh result. All of the parties to a black lung claim are aware, if not actually then constructively, of the order by which individuals may succeed to the right to black lung benefits in the case of death. 20 C.F.R. § 725.545. Each case appealed to a federal cir-

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[3] The Director does not challenge the appointment of the five adult children of Virginia Smith as her personal representative as they appear to be her beneficiaries under the Black Lung Benefits Act. *See* 20 C.F.R. §§ 725.504 725.545. Although Appellate Rule 43(a) allows for the attorney of record to file an appeal in the event of a party's death and no personal representative steps forward, this provision is not applicable here since the attorney who filed the notice of appeal with this court is not Smith's attorney of record before the Board. Since current counsel was not appointed by Smith, they could not act on her behalf. *See Kowaleski*, 879 F.2d at 1177; *see also, U.S. v. Chin*, 848 F.2d 55, 57 (4th Cir. 1988) (in a criminal proceeding, attorneys who represented accused in the criminal action had no authority to act after his death; therefore, his widow as his personal representative is not bound by the attorneys' actions).

[4] An argument could be made that the use of "(deceased)" in the caption of the Notice of Appeal referred to Virginia Smith, and therefore, the Director and the Court had notice. However, in all subsequent pleadings, the term "deceased" clearly refers to Lindel Smith.

cuit court involves only a single order of the Benefits Review Board, affirming or reversing a decision on a claim for benefits. The problems addressed by the Supreme Court in *Torres* are thus not present in black lung benefits litigation.

The Third Circuit's decision in *Kowaleski*, in which the court was faced with a highly unusual set of facts, need not be read to the contrary. In that case, the miner's wife and sole dependent, Anna Kowaleski, predeceased the miner. Prior to the administrative hearing, the miner, Peter Kowaleski, also died. In his subsequent decision, the administrative law judge inadvertently captioned the case in the name of Anna Kowaleski, widow of Peter Kowaleski. Counsel for the miner continued to pursue the claim in the name of Anna Kowaleski. The court found no evidence that Anna Kowaleski or the executor of her estate ever authorized counsel to represent her interests in any matter. Therefore, the court dismissed the petition before it for lack of a real party in interest. In so finding, the court relied on Appellate Rule 15(a) and the Supreme Court's *Torres* decision (*see* discussion *supra*). Noting a motion to amend a petition for review to name a person not already a party to the appeal must be filed within the time limits for filing the original appeal—within 60 days of the entry of the Benefits Review Board decision, the Third Circuit implied that if the case had been continued in the name of the deceased miner *or* in behalf of his estate, the court may have retained jurisdiction.[5] 879 F.2d at 1176-77.

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[5] The Second Circuit has retained jurisdiction where the appellant died after the action was begun but prior to filing this appeal, finding the lack of a motion for substitution was not fatal since no suggestion of death was made to the district court. *Ciccone v. Secretary of the Dept. of Health and Human Services*, 861 F.2d

(Footnote continued on following page)

The Director believes that the remedial purposes of the Black Lung Benefits Act may be best served by permitting the late substitution of Virginia Smith's personal representatives; however, if the Federal Rules of Appellate Procedure are construed strictly, the Court may lack jurisdiction to hear this claim.

The Director does not object to the motion for the substitution of Virginia Smith's children. The purposes of the Black Lung Benefits Act are, in our view, best served by allowing the litigation of this appeal. Because the court is bound to consider jurisdiction despite the absence of an affirmative request by the Director, however, and in light of the unsettled law in this area, we simply note the potential jurisdictional problems for the Court's information.

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[5] *continued*
14, 15 n.1 (2d Cir. 1988). In reaching this conclusion, however, the court relied on an earlier decision where the court proceeded to hear a case because the record below did not yet reflect the death of a party, but that party happened to be the appellee, not the appellant. *Coffee v. Cutter Biological*, 809 F.2d 191, 193 n.1 (2d Cir. 1987).

Respectfully submitted,

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